

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 21, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2017AP887-CR

Cir. Ct. No. 1997CF563

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENNETH J. LAMB,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Eau Claire County:
JON M. THEISEN, Judge. *Affirmed.*

Before Blanchard, Kloppenburg and Fitzpatrick, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Kenneth Lamb appeals an order that denied his motion for sentence modification. The sole issue on appeal is whether the diagnosis of an additional mental disorder and the development of psychological treatments to treat that disorder that were unavailable at the time of Lamb's sentencing constitute a new sentencing factor. We agree with the circuit court that the additional diagnosis and evolving treatment methods do not constitute a new sentencing factor, and therefore affirm.

BACKGROUND

¶2 Lamb was convicted of attempted first-degree intentional homicide, mayhem, and causing mental harm to a child, all involving the use of a dangerous weapon, based upon an incident in which he threw gasoline on the face of his estranged girlfriend and lit her on fire in the presence of her young son. The stated reason for the attack was to disfigure the victim so that another man would not want her. The victim suffered second and third-degree burns over half of her body.

¶3 Psychologist Dr. Richard Fuhrer examined Lamb prior to sentencing. Fuhrer observed that Lamb "grew up in a violent, alcoholic family, and was emotionally and physically abused throughout childhood"; that he was "steeped in pornography from an early age"; that he "abused alcohol and numerous other drugs throughout most of his adolescence and adulthood"; and that he "developed into an angry, jealous, physically abusive man." Fuhrer concluded that Lamb exhibited "strong sociopathic traits, mixed with a high level of suspicion, anger, and anxiety," indicating a "serious personality disturbance with defective psychological structures and a failure to develop adequate internal cohesion," which in turn resulted in "an unsatisfactory development of coping

strategies” and extremely poor ability to handle conflict. Fuhrer further opined that Lamb was “subject to mood swings and contradictory feelings and behaviors”; “lack[ed] frustration tolerance” and was “easily provoked into sudden unpredictable hostility;” and had “a pathologically strong need to control others.”

¶4 Fuhrer diagnosed Lamb with: (1) Axis I adjustment disorder with anxiety; (2) Axis I alcohol and other substance abuse and dependency; and (3) Axis II mixed personality disorder with antisocial (sociopathic) and borderline personality traits. Fuhrer noted that “[i]t is difficult to identify a treatment that would be effective with [Lamb] given his mixture of personality traits and patterns [because people] with the personality traits indicated above do not usually respond well to traditional psychotherapy.”

¶5 Based upon Fuhrer’s evaluation, the circuit court found that there was no reasonable probability that Lamb could be rehabilitated—that is, that he could be “treated and brought to the point where he could be released from confinement and lead a more normal nonthreatening life.” The court concluded that Fuhrer needed to be confined for the maximum time permitted by law in order to protect the public, and it imposed an indeterminate sentence of 105 years.

¶6 In 2016, psychologist Dr. Stephen Kaplan conducted a new evaluation of Lamb, to determine whether Lamb was then “capable of internalizing prosocial norms and controlling his behavior sufficiently to safely allow him outside of prison, or whether any existing therapeutic techniques would help bring him to that point.”

¶7 Kaplan agreed with Fuhrer that Lamb “definitely met [the] criteria for a severe personality disorder, along with a mood disorder, when he committed his crime.” However, Kaplan disagreed with Fuhrer’s diagnosis that Lamb’s

disorder included borderline personality traits, instead concluding that Lamb's symptoms of difficulty tolerating stress, interacting with other people, dealing with changes in routine, and inhibiting behavioral excesses were attributable to Post Traumatic Stress Syndrome (PTSD).

¶8 Kaplan then noted that there were a number of treatments for PTSD that had not been available at the time Lamb was sentenced, although he acknowledged that Lamb's "personality traits are probably less open to significant modification." Kaplan concluded that if Lamb were to have "access to PTSD specific treatments, which are typically long term and fairly intensive, and, if he sufficiently benefits from those treatments, he may develop adequate impulse control and more accurate affective assessments of emotional material to successfully curb his behavioral excesses when he is angered or afraid."

¶9 Lamb moved to modify his sentence based upon Kaplan's report, arguing that the development of treatments for PTSD constituted a new sentencing factor. The circuit court denied the motion without a hearing, and Lamb appeals.

STANDARD OF REVIEW

¶10 Whether a particular set of facts constitute a new sentencing factor is a question of law subject to de novo review. *State v. Harbor*, 2011 WI 28, ¶36, 333 Wis. 2d 53, 797 N.W.2d 828. However, the determination whether a new factor warrants a modification of sentence lies within the circuit court's discretion. *Id.*, ¶37. If a court determines either that the defendant has failed to demonstrate that a new factor exists as a matter of law, or that the alleged new factor would not warrant relief within the court's exercise of discretion, the court need not address the other part of the test. *Id.*, ¶38.

DISCUSSION

¶11 A circuit court has ongoing inherent authority to modify a previously imposed sentence based upon a new factor. *State v. Crochiere*, 2004 WI 78, ¶12, 273 Wis. 2d 57, 681 N.W.2d 524. A new sentencing factor is a fact or set of facts highly relevant to the imposition of sentence but not known to the trial judge at the time of sentencing, either because it was not then in existence or because it was unknowingly overlooked by all the parties. *Harbor*, 333 Wis. 2d 53, ¶¶40, 52 (reaffirming test set forth in *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). In order to obtain relief, a defendant must demonstrate by clear and convincing evidence both the existence of a new factor and that the new factor justifies sentence modification. *Id.*, ¶¶36-38.

¶12 Lamb contends that “the treatability of PTSD was unknown to the parties at sentencing,” and that it was highly relevant to sentencing due to the sentencing court’s conclusion that there was no reasonable probability that Lamb could be rehabilitated. The State points out that, absent a diagnosis that Lamb suffered from PTSD, the availability of treatments for PTSD would have no relevance to Lamb’s sentence. The State then attempts to characterize Lamb’s claim as merely contradicting the original diagnosis of borderline personality disorder, analogous to a claim of inaccurate sentencing information.

¶13 We see a difference between adding a new diagnosis based upon advancement in mental health research and disputing a prior diagnosis based upon the criteria or knowledge that was available at the time. However, we need not resolve whether Fuhrer’s diagnosis was inaccurate at the time it was made, or could only be shown to be inaccurate or incomplete based upon advanced

knowledge in the field, because we conclude that the new PTSD diagnosis was still insufficient to constitute a new sentencing factor.

¶14 That is, even assuming that Kaplan’s report would be sufficient to establish a new diagnosis that Lamb suffered from PTSD, nothing in Kaplan’s report disputed Fuhrer’s conclusion that Lamb also suffered from a personality disorder with antisocial or sociopathic traits. To the contrary, Kaplan concurred with that diagnosis, and acknowledged that those traits were not generally amenable to treatment. New information showing that *some* of Lamb’s mental health issues might have been amenable to treatment did not negate the fact Lamb still suffered from *other* mental health issues that were *not* amenable to treatment.

¶15 Finally, even assuming that the amenability of some of Lamb’s mental health issues to treatment might have some bearing on Lamb’s overall prospects for rehabilitation, there was nothing in Kaplan’s report that would create a reasonable probability that Lamb could be rehabilitated sooner than the earliest potential parole date associated with his maximum sentence. Kaplan mentioned “long term” treatments that “may” allow Lamb to develop better impulse control. He gave no indication as to how many years of PTSD treatment might be necessary, or what the probability was that Lamb would actually benefit from such treatment to a degree that would protect society.

¶16 We conclude that the circuit court correctly determined that Kaplan’s report was insufficient to establish a new sentencing factor.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

